



IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

**79-532**

MARGARET HARTE,

Petitioner

vs.

THE COUNTY OF LOS ANGELES,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPERIOR COURT OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

---

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Counsel for Petitioner

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1979  
No. \_\_\_\_\_

MARGARET HARTE,  
Petitioner

vs.

THE COUNTY OF LOS ANGELES,  
Respondent.

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPERIOR COURT OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

TO THE HONORABLE, THE CHIEF JUSTICE AND  
ASSOCIATE JUSTICES OF THE SUPREME COURT  
OF THE UNITED STATES:

Margaret Harte, the petitioner herein,  
prays that a writ of certiorari issue to  
review the judgment of the Superior Court  
of California for the County of Los  
Angeles entered in the above entitled case  
on September 15, 1976. This judgment of  
the Superior Court was appealed to the

Court of Appeal of the State of California, Second Appellate District, Division Four which affirmed this judgment of the Superior Court on December 18, 1978, and remitted the record to the Superior Court. A prior judgment in the same case was entered on September 17, 1975.

#### OPINIONS BELOW

A copy of the earlier judgment entered on September 17, 1975, is appended to this petition in the Appendix A.

A copy of the second judgment entered on September 15, 1976, is appended to this petition in the Appendix B.

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four, is reported at 87 Cal.App.3d, 419, and 151 Cal.Rptr. 88, and a copy thereof is appended to this petition in the Appendix C.

#### JURISDICTION

The judgment of the Court of Appeal (Appendix C) was filed on December 18, 1978, and became final on January 17, 1979. A timely Petition for Hearing was filed with the Supreme Court of the State of California on January 24, 1979, and was denied by the California Supreme Court on February 14, 1979 (Appendix D). The jurisdiction of the Supreme Court is invoked under Amendment V of the Constitution of the United States.

#### QUESTIONS PRESENTED

The petitioner obtained a judgment on September 17, 1975, decreeing that she be restored to her job as nurse for respondent because she was wrongfully discharged, and that she was entitled to full back pay and benefits. No appeal was taken from this judgment and time for appeal and motion for new trial under California law elapsed.

Thereafter, petitioner sought to enforce the judgment as to the full back pay, which was withheld from her by the



respondent. A hearing was held and judgment rendered by the Superior Court on September 15, 1976 (Appendix B), wherein the Superior Court decreed that respondent was entitled to an off-set of \$34,534.00, based on an ordinance of Los Angeles County, California. The California Court of Appeal affirmed this judgment (Appendix C).

The questions presented are:

1. Whether the Appellate Court of a state has the right to affirm a judgment which has the effect of modifying a prior judgment in the case from which no appeal has been taken, contrary to the well-established law of the state.

2. Does the Appellate Court of a state have the right to affirm the judgment of an inferior court which has the effect of modifying a prior judgment in the same case by basing its decision on an issue that was not raised by the respondent in the prior proceedings.

#### CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States,  
Amendment V:

"No person shall . . . be  
deprived of life, liberty,  
or property, without due  
process of law . . . ."

#### STATEMENT OF CASE

The petitioner, MARGARET HARTE, was employed by the County of Los Angeles as a nurse from 1959 to 1969. An adverse report on her work performance was filed by two supervisors who also denied petitioner the right to have her "representative" present at the meeting to examine into the adverse evaluation. Subsequently, she was reduced in employment status to Assistant Head Nurse I, and discharged because she was erroneously told there were no openings for that category.

Petitioner unsuccessfully appealed her reduction to the Civil Service Commission, charging fraud and discrimination. She then sought a Writ of Mandate in the

Superior Court. The Court held there was sufficient evidence to support the finding of the Civil Service Commission.

Petitioner next appealed this decision to the Court of Appeal of the State of California, Second Appellate District, Division Two. The Court of Appeal reversed. (The opinion was designated "Not For Publication." A copy thereof is appended to this petition in the Appendix E). The Court stated, p. 8,

"Harte's cause is not lost in the ephemerality of her job title, however, for even a probationary public employee may not be dismissed from employment for the exercise of constitutional rights . . . ."

Thereafter, the Superior Court signed and filed its judgment of September 12, 1975 (Appendix A), hereinafter referred to as the "first judgment." This judgment ordered petitioner's reinstatement with "full back pay, rights, privileges, and benefits from the date of her wrongful reduction, including but not limited

to seniority, retirement, and pension benefits." The judgment made no mention of offsets despite the fact that the Court was aware that petitioner had been working in private nursing after her wrongful discharge by the County of Los Angeles. No appeal was taken from this judgment and it became final under California law.

The County of Los Angeles neglected to pay the back pay, so petitioner, on January 22, 1976, filed an Application for Issuance of Writ of Execution, which was set for hearing in the Superior Court. At this hearing, the County of Los Angeles asserted an offset against the back pay in the amount earned by petitioner after her discharge. This assertion was based on a provision of a county ordinance, but was never raised by the County of Los Angeles at any stage of the proceedings culminating in the first judgment. Nevertheless, the Superior Court rendered its judgment on September 15, 1976, (hereinafter called the "second judgment") in which it decreed that the accrued back pay of \$84,825.00 of petitioner should be

offset by \$34,534.00 earned by her after her wrongful discharge.

From the second judgment, the petitioner once again appealed to the California Court of Appeal. This Appellate Court, in its decision (Appendix C), affirmed the second judgment. In effect, it altered the first judgment (which had become final and the law of the case). California law, as will be pointed out, does not permit judgments to be corrected for judicial error by the trial court. An appeal must be taken. No appeal was taken from the first judgment.

#### REASON FOR GRANTING THE WRIT

The decision of the California Court of Appeal is believed to be erroneous in that it effectively permitted the deprivation of property of petitioner (a sum in excess of \$30,000) without due process of law.

1. In affirming the second judgment, that in effect modified the first judgment which, under California law had become final, and the law of the case,

the court below, it is believed, acted contrary to the principle of due process as enunciated in Amendment V of the United States Constitution. The law of California is illustrated by the following excerpts of decisions of the Supreme Court of California:

In Re Eckstrom's Estate (1960) 54 Cal.2d 540, 544, 545, 354 P.2d 652.

"A court can always correct a clerical, as distinguished from a judicial error which appears on the face of a decree by a nunc pro tunc order.

(citation). It cannot, however, change an order which has become final even though made in error, if in fact the order made was that intended to be made . . . .

. . . It is hornbook law that the decree of distribution when it becomes final, is conclusive as to the rights of heirs, devisees and legatees . . . . It is conclusive even if erroneous and though the record itself shows that it is erroneous."



And in Stevens v. Superior Court (1936) 7 Cal.2d 110, 59 P.2d 988, the California Supreme Court stated, at pages 113 and 114:

"(A)ll of the matters before the court at the time of the making of the second order having been considered by it at the time of the making of the first order, it cannot, simply because upon a re-examination of the same matters it has reached a different conclusion, give effect to a second determination of the same issue by modifying or annulling the original order or judgment. This is judicial error and is subject to review only upon appeal, the same as any other mistake due to a failure to give proper consideration to a bit of evidence or to the effect of the evidence . . . ."

2. The applicable principle of appellate review appears to be stated in 16A Corpus Juris Secundum 847:

"While a statutory review is not a requirement of due process, when such a right is created it is important, and must be exercised without discrimination . . . . There may be a denial of due process in connection with appellate review . . . or by decree of the appellate court on an issue not raised in the trial court . . . ."

The opinion of the California intermediate appellate court in its review of the second judgment stated:

"Because of the final provision in the order, directing that it be made retroactively effective as of the date of the judgment, both parties have discussed, elaborately, the cases involving the power of a trial court to make nunc pro tunc revisions of a judgment. Those cases are not here material. As originally drawn, the judgment patently was ineffective to allow plaintiff to secure a writ of



execution; clearly a new proceeding was required to fix the dollar amount to be inserted in such a writ. The proceeding herein involved was a proper proceeding to make the judgment enforceable in that regard.

"In the proceeding resulting in the order now attacked it was necessary for the trial court to ascertain, among other things, the dollar amount of back pay to which plaintiff was entitled. In performing that duty, the court was not restricted to a mere determination of the number of days involved, but to the pay provisions under which plaintiff was employed. (Markman v. County of Los Angeles (1973) 35 Cal.App.3d 132, 110 Cal.Rptr. 610). Among those provisions was the section of the county salary ordinance calling for credit to the county for outside income. The trial court properly considered that part of the ordinance and gave to plaintiff only

the net amount to which the ordinance, as a whole, entitled her."

The first judgment decreed that petitioner was entitled to all back pay, and the appellate court was correct in stating that the dollar amount of back pay would have to be ascertained. However, the amount of offset, or "credit to the county for outside income" was not raised in those proceedings giving rise to the first judgment, and where the county salary ordinance even if it were applicable, could have received judicial notice by the trial court. Under the law of California, the first judgment had become final, the law of the case, and was not subject to correction. The affirmance of the second judgment does, in effect, constitute such correction.

3. This court has not passed on the question of due process as it relates to the decision of a state appellate court in the type of matter raised herein.

Other courts have touched on the question, however. In Kyle v. Wiley, D.C. Mun. App. 78 A.2d 769, it was held

that while due process of law under the Fifth Amendment to the Federal constitution as under the Fourteenth Amendment to the Federal constitution, does not require appellate review, nevertheless when Congress creates that right, it is not free from all constitutional restrictions, including the obligations not to make unreasonable discrimination.

And in Williams v. Bank of America Nat. Assn. (1932) 55 F.2d 884, where a statutory set off was not pleaded in the answer, the United States Court of Appeals, Second Circuit, stated, at page 889:

"Finally, it is suggested that at least the defendant should be allowed as a set off under section 60 (c) of the \$12,000 lent after October eighteenth. This question is not before us. The statute expressly makes such loans available only as a set off, and the answer should have pleaded it. (citations). It did not; it contained only traverses,

Moreover, the point is not even intimated in the assignment of error; and even in the briefs the argument is so uncertain that we cannot be sure just what is intended. It would make no difference, if it were otherwise; we cannot undertake to decide a point that was not raised below.

#### CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,  
MARVIN G. POVERNY  
Counsel for Petitioner

## **APPENDIX A**

SCHWARTZ, STEINSAPIR & DOHRMANN  
Attorneys at Law  
6404 Wilshire Blvd., Suite 950  
Los Angeles, CA 90048

ORIGINAL FILED

(213) 653-6510

SEP 12 1975

Attorneys for Plaintiff COUNTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

MARGARET HARTE, )  
Plaintiff, )  
vs. )  
COUNTY OF LOS ANGELES, )  
Defendant. )

NO. C 45574

JUDGMENT

This cause came on regularly for trial, August 14, 1975, in Department 88 of the above-entitled court, the Honorable Jerry Pacht, Judge, presiding, plaintiff appearing by Paul O. Halme, Esq. of Schwartz, Steinsapir & Dohrmann, and defendant appearing by Los Angeles County Counsel, Joe Ben Hudgens, Esq., and evidence both oral and documentary have been presented by both parties and the cause having been argued and submitted for decision.



IT IS ORDERED, ADJUDGED AND DECREED  
that plaintiff, MARGARET MARY HARTE have  
judgment against defendant, LOS ANGELES  
COUNTY, as follows:

1. Plaintiff be reinstated to her  
position as Jail Nurse with full back  
pay, rights, priveleges and benefits  
from the date of her wrongful reduction,  
including but not limited to seniority,  
retirement and pension benefits.

DATED: SEP 12 1975

/s/ JERRY PACHT  
Judge of the Superior Court

APPENDIX B

CANTER & HALME  
482 Fourth Place  
P.O. Box 1005  
Solvang, California 93463

Telephone: (805) 688-5593

Attorneys for Plaintiff

F I L E D  
SEP 15 1976  
John J.  
Corcoran,  
Acting County  
Clerk  
  
A. Misko  
By A. Misko,  
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

MARGARET HARTE,	)	
Plaintiff,	)	No. C 45574
v.	)	ORDER THAT
COUNTY OF LOS ANGELES,	)	JUDGMENT DEBTOR
Defendant.	)	APPEAR AND
	)	ANSWER CONCERN-
	)	ING HIS PROPERTY
	)	(C.C.P. 714)

The Plaintiff's application for Order That Judgment Debtor Appear and Answer Concerning His Property came for hearing on July 27, 1976 in Department 47 of the above-entitled court, the Honorable Jerry Pacht, Judge, presiding, plaintiff appearing by Paul O. Halme, Esq. of Canter & Halme, and defendant appearing by Los Angeles County Counsel, Joe Ben Hudgens,

Esq. and evidence both oral and documentary have been presented by both parties and the cause having been argued and submitted for decision;

It appearing to the satisfaction of the Court that the plaintiff, MARGARET M. HARTE, the judgment creditor, on September 12, 1975, recovered judgment in this action against defendant, COUNTY OF LOS ANGELES, the judgment debtor, for a sum equal to her full back pay for the period March 20, 1969, to October 5, 1975, among other benefits associated with her employment; that the judgment was entered in the Judgment Book of the Superior Court of the State of California for the County of Los Angeles, in Volume No. 7058, Page 21, on September 15, 1975; that the judgment has not been satisfied, vacated, reversed or barred by the statute of limitations; that the judgment is one on which execution may properly be issued; and that the judgment remains unpaid in part, and there is now due and owing on it the following equal to her back pay and benefits:

1. Plaintiff has accrued \$84,825.00

B-2.

in back pay, to which must be added 7% interest from September 15, 1975.

Against that sum, plaintiff is required to offset, by deducting, \$34,534.00 which she earned while she was not working for the County and which she could not have earned had she been regularly employed by the County. Plaintiff shall be paid the difference between the accrued back pay with interest and the offset amount.

2. Plaintiff will receive accrued vacation for 220 days. Said vacation can at the election of plaintiff be taken commencing immediately or in an amount equal to 220 days times \$63.937¢ her daily rate of pay.

3. Plaintiff will receive sick pay representing 12 days per year for 6.5 years or the sum of 78 days' sick pay times \$63.937¢ her daily rate of pay.

4. The Plaintiff and defendant will make social security contributions from the period of reinstatement, October 5, '75 until July, 1976 to make plaintiff whole on her social security contributions since reinstatement.

B-3.

5. The plaintiff and defendant shall reinstate plaintiff's pension fund, make pension contributions at the appropriate rate to the present date to make plaintiff's pension whole for the entire period of county service, October 1959 to the present date.

It is Ordered, Adjudged and Decreed that the above ruling of the Court be retroactive to September 15, 1975, the date of the Court's order in this matter; that said figures further clarify the Court's order of that date; and that the Treasurer of the County of Los Angeles or his designee be required to appear before the Court at a date and time to be set by plaintiff if satisfaction of judgment has not been filed by plaintiff within 60 days of the date of this order.

Dated: 15 Sept. '76

/s/ Jerry Pacht  
Judge of the Superior Court

APPROVED AS TO FORM:

JOHN H. LARSON, COUNTY COUNSEL

By /s/ Joe Ben Hudgens  
Joe Ben Hodgens, Principal  
Deputy County Counsel

B-4.

## APPENDIX C



CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA, SECOND APPELLATE DISTRICT,  
DIVISION FOUR

MARGARET HARTE,	)	2 Civ. No. 52983
Plaintiff and	)	(Super. Ct. No.
Appellant,	)	C 45574)
vs.	)	COURT OF APPEAL-
COUNTY OF LOS ANGELES,	)	SECOND DIST.
Defendant and	)	F I L E D
Respondent.	)	DEC 18 1978
		CLAY ROBBINS, JR.
		CLERK

APPEAL from an order of the Superior  
Court, Los Angeles County. Jerry Pacht,  
Judge. Affirmed.

Law offices of Godfrey Isaac, a  
Professional Corporation, Godfrey Isaac  
and Lawrence Jay Kraines, for Plaintiff  
and Appellant.

John H. Larson, County Counsel,  
William F. Stewart, Division Chief, Joe  
Ben Hudgens, Principal Deputy County  
Counsel, for Defendant and Respondent.

Plaintiff was reduced in rank in her employment as a nurse by the County of Los Angeles and, because there was no vacancy in the new rank, was laid off. After extensive litigation, she recovered judgment ordering her reinstatement "with full back pay, rights, privileges and benefits from the date of her wrongful reduction, including but not limited to seniority, retirement and pension benefits." Because of a dispute as to the dollar amount that the county was required to pay under that judgment, a further hearing was held before the same judge as had made the judgment. That proceeding resulted in an order which spelled out, in partial detail,<sup>1/</sup> the amount involved. We set out the pertinent portions of that order in an

---

<sup>1/</sup> Probably because the proceeding was in aid of plaintiff's attempt to secure a writ of execution, the order determines dollar amounts only for the money that is directly payable to plaintiff, still leaving uncertain the amounts to be paid by the county under paragraphs 4 and 5 of the order. No complaint is made here of that fact.

appendix to this opinion. On this appeal by plaintiff from that order, the parties argue only the provisions in paragraph 1 requiring plaintiff to give a credit for the amounts earned by her in private employment during the period of her lay-off. We affirm the order.

Because of the final provision in the order, directing that it be made retroactively effective as of the date of the judgment, both parties have discussed, elaborately, the cases involving the power of a trial court to make nunc pro tunc revisions of a judgment. Those cases are not here material. As originally drawn, the judgment patently was ineffective to allow plaintiff to secure a writ of execution; clearly a new proceeding was required to fix the dollar amount to be inserted in such a writ. The proceeding herein involved was a proper proceeding to make the judgment enforceable in that regard.

In the proceeding resulting in the order now attacked it was necessary for the trial court to ascertain, among other things, the dollar amount of back pay to

which plaintiff was entitled. In performing that duty, the court was not restricted to a mere determination of the number of days involved, but to the pay provisions under which plaintiff was employed. (Markman v. County of Los Angeles (1973) 35 Cal.App.3d 132.) Among those provisions was the section of the county salary ordinance calling for credit to the county for outside income. The trial court properly considered that part of the ordinance and gave to plaintiff only the net amount to which the ordinance, as a whole, entitled her.

The order is affirmed.

CERTIFIED FOR PUBLICATION

KINGSLEY, Acting P.J.

We concur:

JEFFERSON (Bernard), J.

ALARCON, J.

C-4.

## A P P E N D I X

"1. Plaintiff has accrued \$84,825.00 in back pay, to which must be added 7% interest from September 15, 1975. Against that sum, plaintiff is required to offset, by deducting, \$34,534.00 which she earned while she was not working for the County and which she could not have earned had she been regularly employed by the County. Plaintiff shall be paid the difference between the accrued back pay with interest and the offset amount.

"2. Plaintiff will receive accrued vacation for 220 days. Said vacation can at the election of plaintiff be taken commencing immediately or in an amount equal to 220 days times \$63,937¢ her daily rate of pay.

"3. Plaintiff will receive sick pay representing 12 days per year for 6.5 years or the sum of 78 days' sick pay times \$63.937¢ her daily rate of pay.

"4. The Plaintiff and defendant will make social security contributions from the period of reinstatement, October 5, '75 until July, 1976 to make

C-5.

plaintiff whole on her social security contributions since reinstatement.

"5. The plaintiff and defendant shall reinstate plaintiff's pension fund, make pension contributions at the appropriate rate to the present date to make plaintiff's pension whole for the entire period of county service. October 1959 to the present date.

"It is Ordered, Adjudged and Decreed that the above ruling of the Court be retroactive to September 15, 1975, the date of the Court's order in this matter; that said figures further clarify the Court's order of that date; and that the Treasurer of the County of Los Angeles or his designee be required to appear before the Court at a date and time to be set by plaintiff if satisfaction of judgment has not been filed by plaintiff within 60 days of the date of this order."

#### APPENDIX D



CLERK'S OFFICE, SUPREME COURT,  
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

FEB 14 1979

*I have this day filed Order*\_\_\_\_\_

HEARING DENIED

*In re:* 2 Civ. *No.* 52983

Harte

*vs.*

County of Los Angeles

*Respectfully,*

G. E. BISHEL  
*Clerk*

03421-877 8.78 AM OBP

**APPENDIX E**

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA, SECOND APPELLATE DISTRICT,  
DIVISION TWO

MARGARET M. HARTE,	) 2D CIVIL NO.
	) 42626
Petitioner and	)
Appellant,	) (Sup.Ct.No.
	) C 45574}
v.	)
COUNTY OF LOS ANGELES	) COURT OF
CIVIL SERVICE COMMISSION	) APPEAL-SECOND
OF COUNTY OF LOS ANGELES,	) DIST.
THELMA T. MAHONEY, O.	) F I L E D
RICHARD CAPEN, EMMETT M.	) JUL 2 - 1974
SULLIVAN,	)
Respondents.	) CLAY ROBBINS,
	) JR. Clerk

---

APPEAL from judgment of the Superior  
Court of Los Angeles County. Campbell M.  
Lucas, Judge. Reversed with direction.

Irene S. Chait, Attorney at Law, for  
Appellant.

John H. Larson, County Counsel, by  
Joe Ben Hudgens, Deputy County Counsel,  
for Respondents.

---

Margaret M. Harte appeals the judgment of the superior court denying her petition for a writ of mandate to compel the County of Los Angeles to re-employ her as a Jail Nurse with full back pay and damages. The issue is whether the superior court exercised the proper standard in reviewing proceedings before the County Civil Service Commission.

#### BACKGROUND

Harte began her most recent employment with the County on 13 December 1968 as a probationary Jail Nurse for the Sheriff's Department at Sybil Brand Institute for Women. In late January 1969 two of Harte's supervisors evaluated her work performance and found it unsatisfactory, especially with respect to compliance with jail security procedures. Harte's supervisors attempted to discuss the evaluations with her, but Harte refused because the supervisors denied her request to have her "representative" present at the discussion. Subsequently, the Sheriff's Department reduced Harte's employment status from probationary Jail

Nurse to Assistant Head Nurse I, equivalent to the position she held during previous employment with the County. Because the Sheriff's Department had no positions for Assistant Head Nurse I, it placed Harte on the "County-wide lay-off list."

#### CIVIL SERVICE PROCEEDINGS

Harte appealed her reduction to the County Civil Service Commission, charging fraud and discrimination. At a hearing on the reduction Harte testified that she had not violated jail security procedures. One of the supervising nurses who evaluated her performance was upset because Harte told her she was "one-hundred percent union" and refused to join a professional nurses' association. The supervising nurse posted a list of all jail nurses indicating whether they had joined the professional nurses' association; next to Harte's name the supervisor wrote "Ref. 100% Union." And another supervising nurse told Harte she was being discharged because she wanted a representative present at her evaluation



discussions. One of Harte's supervising nurses testified that Harte complied with jail security procedures and showed willingness to learn and improve, but two others testified that Harte did not comply with security procedures and was reluctant to learn and follow orders.

The Commission found that Harte failed to comply with jail security procedures, that she refused to discuss her performance evaluations without the presence of her representative but she did not indicate she meant a "union" representative, and concluded that Harte's reduction did not result from fraud or discrimination.

#### SUPERIOR COURT PROCEEDINGS

Harte petitioned for a writ of mandate in the superior court. The court reviewed the transcripts of proceedings before the Civil Service Commission and denied the petition concluding that the Commission did not abuse its discretion in sustaining Harte's reduction and that substantial evidence

supported the Commission's finding that the reduction did not result from fraud or discrimination.

#### DISCUSSION

The issue is whether the superior court properly evaluated the evidence before it as providing substantial support for the Commission's findings of non-discrimination or whether the court should have reweighed the evidence and made an independent determination of its own on that issue.

We first consider Strumsky v. San Diego County Employees Retirement Assn., 11 Cal.3d 28, 44, the opinion which holds that if the decision of a non-constitutionally-created government administrative agency affects a fundamental vested right, on review to determine whether the agency has abused its discretion the superior court must exercise its independent judgment on the evidence. Even where, as here, the administrative agency has concluded a full and fair adversary hearing on disputed factual questions, Strumsky requires the superior court to

reweigh the evidence from the cold record of the administrative proceedings.

Only "fundamental vested" rights invoke a second review of the evidence, however. The concept of "fundamentalness" is apparently beyond precise definition: "the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation." (Bixby v. Pierno, 4 Cal.3d 130, 144.) Thus, if the right to continue to practice a profession is fundamental (Yakov v. Board of Medical Examiners, 68 Cal.2d 67, 78), can it be said that the right to a particular position within that profession is any less fundamental?

We do not reach the question of fundamentalness here because we have concluded that Harte's right to a position as a Jail Nurse, even if fundamental, had not yet "vested." Harte had mere probationary status as a Jail Nurse; she had a vested right only to her previously-held permanent position as an Assistant Head Nurse I. (See Bixby v. Pierno, 4 Cal.3d 130, 136.)

Harte's cause is not lost in the ephemerality of her job title, however, for even a probationary public employee may not be dismissed from employment for the exercise of constitutional rights absent a showing that the restraints which the employing body would impose on those rights are justified by a compelling public interest. (Bogacki v. Board of Supervisors, 5 Cal.3d 771, 778.) And the "dismissed public employee is entitled to a judicial determination of the true reason for his dismissal when he presents evidence tending to show that he was dismissed for the exercise of constitutional rights whose consequent limitation was not justified by a compelling public interest." (Bekiaris v. Board of Education, 6 Cal.3d 575, 592.)

Constitutional rights to freedom of assembly and speech protect the right to participate in union activities. (Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 682; see also Bogacki v. Board of Supervisors, supra, 5 Cal.3d 771.) In addition, state statutes guarantee the right of public employees to

participate in the activities of employee organizations. (Gov. Code. §§ 3500 et seq.; see Social Workers' Union Local 535 v. Alameda County Welfare Department, 11 Cal.3d 382, 387.) Harte had no right to the presence of a union representative at a discussion with her employer concerning her non-union-related job performance evaluation. However, she presented some substantial evidence that discrimination based on her union membership motivated the initial evaluations of her job performance as substandard. We therefore conclude that the superior court erred in applying the substantial evidence test to the findings of the Commission on the issue of discrimination. Even if substantial evidence supports a finding that grounds existed for Harte's reduction, she is entitled to an independent judicial adjudication of the true reasons for her reduction. (Bekiaris v. Board of Education, supra, 6 Cal.3d 575, 592.)

We reject the County's contention that Harte did not properly raise the issue of union discrimination in the superior court. (See Bogacki v. Board of

Supervisors, supra, 5 Cal.3d 771, 779-780.) Harte's pleadings in the superior court allege that the County reduced her employment because she requested the presence of a union representative at her work performance evaluation discussion; she presented oral argument on the question of union discrimination and offered to amend her pleadings if they did not sufficiently raise the point; and her written trial memorandum asserted her right to a judicial determination on the evidence.

The judgment is reversed and the cause remanded to the superior court for further proceedings in accordance with this opinion.

NOT FOR PUBLICATION.

FLEMING, J.

We concur:

ROTH, P.J.

BEACH, J,



**IN THE  
SUPREME COURT  
OF THE UNITED STATES**

October Term, 1979

No.

**79-532**

**MARGARET HARTE,**

Petitioner,

vs.

**THE COUNTY OF LOS ANGELES,**

Respondent.

---

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPERIOR COURT OF CALIFORNIA FOR  
THE COUNTY OF LOS ANGELES**

**BRIEF FOR RESPONDENT IN OPPOSITION**

**JOHN H. LARSON**  
County Counsel

**WILLIAM F. STEWART**  
Chief, Labor Relations Division

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Supreme Court, U.S.  
**FILED**

**OCT 17 1979**

MICHAEL MODAK, JR., CLERK



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BRIEF FOR RESPONDENT IN OPPOSITION

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The order of the California Supreme Court, the last court before which petitioner sought to present this case, appears as Exhibit D to the Petition. It is dated February 14, 1979.

Section 2101(c) of Title 28 of the United States Code specifies that a petition for a writ of certiorari must be filed within ninety days, and that the filing period can only be extended by an additional sixty

1.

days. Thus, even if this Court had enlarged the time for filing the Petition in this case, the enlargement could not have extended beyond mid-July, 1979.

The filing of the petition out of time deprives this Court of the jurisdiction to entertain it. Scarborough v. Pargoud, 108 U.S. 567, 27 L.Ed. 824, 2 S.Ct. 877 (1883).

For that reason, the petition should be denied.

Respectfully submitted,

JOHN H. LARSON  
County Counsel

WILLIAM F. STEWART  
Chief, Labor Relations Division

JOE BEN HUDGENS  
Principal Deputy County Counsel

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